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SUPREME COURT OF THE UNITED STATES

October Term, 1906.

No. ~~223~~. 90.

W. C. LYKINS AND E. W. W. LYKINS,
Plaintiffs in Error,
vs.
MRS. R. McGRATH,
Defendant in Error.

No. 17,808.

THE ALLOTTEE, HAVING SOLD AND CONVEYED THE LAND, HAVING PERFORMED EVERY ACT IN HIS POWER TO DIVEST THE TITLE, THE CONSENT OF THE SECRETARY COULD BE GIVEN AT ANY TIME, AND, WHEN GIVEN, IT RELATED BACK TO THE DATE OF THE DEED.

It will be seen from the statement of the case in the opposing brief that this was a case of ejectment. The father of the plaintiffs in error was a member of the Peoria tribe of Indians. The land in question was allotted to him under the second and third articles of the treaty of May 30, 1854. (Rev. Ind. Treat. 426). The patent is dated November 1st, 1859 (Rec. p. 8). An act of congress subsequently enacted (11 Stat. 430) required con-

veyances of the allotted lands to be made with the consent of the secretary of the interior. On June 3, 1864, the patentee of the land sold and conveyed it to one Baptiste Peoria, and the defendant holds under this deed. On August 14, 1864, David Lykins, the grantee in the patent, departed this life. The consent of the secretary to the conveyance was given on March 10, 1865. No fraud or imposition is alleged. The sole basis of the action is the death of the patentee intermediate the date of his conveyance and the approval thereof by the secretary. The plaintiffs in error, if they ever had any title to the land, obtained it by inheritance on August 14, 1864. They slept on their rights, if they had any, from that date until March 30, 1899, or almost thirty-five years. The period of prescription as to real estate in Kansas is 15 years. (See Clause 4, Section 16, Kan. Code, Gen. Stat. 1899, p. 877).

In *Pickering v. Lomax*, 145 U. S. 310, the land involved was patented to Alexander Robinson, an Indian, on December 28, 1843, under article IV of the treaty of Prairie du Chien (7 Stat. 321). The grant was to Robinson for himself and children, and the treaty prohibited the conveyance of the land by him or them, or either of their heirs, without the permission of the president. In a partition suit the land was awarded to Joseph Robinson, one of the children of Alexander Robinson. On August 3, 1858, Joseph Robinson and wife conveyed the land to John F. Horton; on October 6, 1863, the administrator of Horton con-

veyed to one Baer; and the plaintiff claimed through Baer under a deed dated Nov. 10, 1866. On January 21, 1871, the president endorsed his approval on said deed. Mr. Justice BROWN states the point at issue in these words:

"The defendant introduced no evidence, but at the close of the plaintiff's case moved that the plaintiff's testimony be excluded, and the case dismissed, upon the ground that the deed of August 3, 1858, from Joseph Robinson and wife to John F. Horton was made in direct violation of the terms of the patent as to obtaining the approval of the President to the conveyance.

"This motion was sustained, the court being of the opinion that Robinson had no authority to convey without obtaining the permission of the President beforehand, that the subsequent sanction obtained by persons claiming title under Robinson was invalid; and that, even if such sanction would have the effect of giving force to the deed, yet, as the grantee under that deed was dead, the administrator's deed would not carry any title to the purchaser from the administrator, but that, if any title accrued by reason of the sanction of the president, it would be to the heirs of Horton.

"Thereupon the court rendered judgment for the defendant, which was affirmed by the Supreme Court of Illinois (11 N. E. Rep. 175, 120 Ill. 293) and the plaintiff sued out a writ of error from this court."

It will thus be seen that the only difference between that case and the one at bar is that there the *grantee* died before the deed was approved by the president, while here the *grantor* died before the secretary consented to the deed. It does not

appear either in the statement of facts made by this court, or in that made by the Supreme Court of Illinois, whether the grantor was living or dead when the deed was approved.

The dissenting opinion of Mr. Justice Sheldon, 11 N. E. Rep. 175, 179, is very persuasive to the point that the death of neither party to the deed took from the secretary the power which the law conferred upon him. At the time Lykins made the conveyance he held the absolute fee in the land, with the single qualification that he should not convey it without the consent of the secretary. We have, therefore, a conveyance of the land made by Lykins for a valuable consideration, with the consent and approval of the secretary endorsed thereon. The date when this approval was obtained is immaterial. The secretary did consent to the conveyance, and that consent fulfilled the condition of the statute. That condition was designed for the benefit of the Indians, and as a safeguard of their interests against fraud, imposition or improvidence. Congress deemed it wise to exercise a supervisory care over the disposition of the land, and expressed its policy by enacting that the secretary's consent should be obtained to all conveyances. This consent was a duty imposed on the secretary and no one else. How and when he should perform it was for him to determine, and not for the court to adjudge. No time or form of giving the consent was prescribed. Having given his consent to the deed it will be presumed that the secretary discharged

his duty in the light of all the facts, and determined that the grantee paid fair value for the property, and that no covin or imposition was practiced on the grantor.

In *Godfrey v. Beardsley*, 2 McLain, 412, Justice McLAIN said:

"Neither the treaty nor any law prescribes the form in which this sanction (permission) should be given. The treaty imposed the duty upon the president, and he could execute it in such form and manner as his discretion should dictate. * * * Except by permission of the president, Pierre Moran could not convey this land. That permission was obtained before the deed was executed. Now, whether it would have been more judicious to have withheld the sanction until the execution of the deed is a matter about which differences of opinion may exist. But whether given before or after the deed, it is equally within the power of the president."

So in *Jackson v. Hill*, 5 Wend. 532, the approval of the surveyor-general required by law to the deed of an Indian was held to relate back to the date of the deed.

This case and *Godfrey v. Beardsley*, (cited as *Doe v. Beardsley*) are approved and followed in *Pickering v. Lomax*.

When Lykins conveyed the land and received the consideration he did everything he could to divest himself of the title. It was the case of an execution and delivery of a deed to be effective on the happening of a certain event. The date when that event should happen was immaterial,

so far as Lykins, or his heirs, are concerned. The event did happen, and thereupon the deed became as fully effective as a deed placed in escrow would on performance of the specified conditions. The fact that the death of the grantor occurred between the date of the deed and its approval does not affect the question, because the deed had been made and delivered and the consideration paid during the life time of the grantor. The grantee, after he received the deed, had a right to secure the assent of the secretary at any time. That he delayed or was delayed in securing this consent is a matter no one but a *bona fide* purchaser can complain of. Considering the reasons which caused the restriction on the right to convey to be enacted; that is, the protection of the Indian from a bad contract, it would seem that his intervening death could not and should not affect the power of the secretary to approve the conveyance It was as fully within the power of the secretary after the death as it was before to discharge the duty imposed upon him by the law. His approval was required, not as a limitation on the right of the grantor to agree to convey or to convey, but solely in the exercise of the supervisory power of the government over the Indians and their affairs.

It is not the case of a deed executed but not delivered during the lifetime of the grantor, nor a deed executed by an attorney in fact after the death of his principal.

The perfecting of the deed depended solely on the action of the secretary, and when he acted the conveyance was complete, both as against the grantor and his heirs. It avails naught to say, as counsel do, that there is nothing to show that the approval of the deed was not contemplated until after the death of Lykins, for the reason that when he signed and delivered the deed he plainly requested the secretary to consent to it.

It is said this case is unlike one where the grantee died, but no reason for the statement is given. If, as argued in one place, the deed was always void; or, as in another, that it could not be delivered until after the approval, how could such approval ever validate it. The deed in *Pickering v. Lomax*, after approval, was held to be good as against the grantor, and his heirs, from its date. It could not, therefore, have been void, and it must have been delivered before the president acted. Inasmuch as there must be two parties to such a deed, it is clear, if the position of the plaintiff is sound, that the death of either party would end the power of the secretary; and yet this court, in the case just mentioned, held that the death of the grantee did not affect that power. Why, then, should the death of the grantor affect it? If there is any reason why the principle of that case does not decide this one, opposing counsel have signally failed to call attention to it.

Such cases as *McGannon v. Straightledge*, 37 Kan. 87, and *Stevens v. Smith*, 2 Kas. 245, s. c. 10 Wall. 321, are not in point. In the former

case the defendant claimed under a deed made two years before the patent was issued, and which was never approved, while the plaintiff claimed under a conveyance from the heir of the allottee, which was approved. In the latter case the treaty provided (10 Wall. 322) that the land should never be sold without the permission of the United States first had and obtained. Subsequently congress enacted (pp. 322-3) that the land could only be sold by the secretary on request of the allottees. Said act also vested the title to the lands in the United States, and declared void all prior contracts in reference thereto (pp. 325-6). It was because the deed in controversy in that case violated the provisions of the act of congress that it was held void.

The point is made by the plaintiff's that rights of third parties have intervened. By this it must be meant that the rights of the plaintiff's themselves intervened on the death of their ancestor. In *Pickering v. Lomax*, it is held that an approval made about thirteen years after the date of the deed related back to its date and made it effectual: provided, of course, that no third parties had in the meantime legally acquired an interest in the land. This must mean such third parties as are mentioned in the cases cited in the opinion; and they all show that no right of a *bona fide* purchaser has here intervened. It is unnecessary to do more than to quote the definition of that phrase as given by Devlin on Deeds, 2nd Ed., Sec. 813.

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"In order that a person may claim that he occupies the position of a *bona fide* purchaser, when questions arise as to the priority of two or more titles or claims to the same property, it is essential, as one of the facts giving him this character, that he has acquired his right for a valuable consideration. A person who is a mere volunteer, having acquired title by gift, inheritance, or some kindred mode, cannot come within the scope of the term '*bona fide* purchaser'. To enable the grantee to claim protection as a *bona fide* purchaser he must have parted with something possessing an actual value, capable of being estimated in money, or he must on the faith of the purchase have changed, to his deteriment, some legal position that he before had occupied."

U. S. v. Des Moines etc. Co., 142 U. S. 510.

It is also claimed that the death of Lykins prevented the act of the secretary from relating back to the date of the deed. But Mr. Justice FIELD, in *Gibson v. Choteau*, 13 Wall. 92-100-101, says that the doctrine of relation means "that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed." It is a doctrine adopted "*for the purposes of justice.*"

Mr. Justice BROWN, in *Pickering v. Lomax*, *supra*, places the decision of the court in that case on the following grounds:

"The treaty does not provide how or when the permission of the president shall be obtained, and there is certainly nothing which requires that it shall be given before the deed is delivered. *Doe v. Beardsley*, 2 McLean, 412. It is doubtless, as was said by the Supreme Court of Mississippi in *Harmon v. Partier*, 12 Smedes & M. 425, 427, 'a condition precedent to a perfect title' in the grantee; but the neglect in this case to obtain the approval of the president for 13 years only shows that for that length of time the title was imperfect, and that no action of ejectment would have lain until the condition was performed. Had the grantee, the day after the deed was delivered, sent it to Washington, and obtained the approval of the president, it would be sticking in the bark to say that the deed was not thereby validated. A delay of 13 years is immaterial, provided, of course, that no third parties have in the meantime legally acquired an interest in the lands.

"If, after executing this deed, Robinson had given another to another person, with the permission of the president, a wholly different question would have arisen. But, so far as Robinson and his grantees are concerned, the approval of the president related back to the execution of the deed and validated it from that time. As was said by this court in *Cook v. Tullis*, 18 Wall. 332, 338: 'The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification.' See, also, *Fleckner v. Bank*, 8 Wheat 338, 363. In *Ashley v. Eberts*, 22 Ind.

55, a similar act of the president approving a deed was held to relate back and give it validity from the time of its execution, so as to protect the grantee against a claim by adverse possession which arose in the interim between its date and the confirmation. 'Otherwise,' said the court, 'a mere trespasser by taking possession after a valid sale, and before its consummation, would have power to defeat a *bona fide* purchaser.' * * *

"Nor do we consider it material that the grantee had in the meantime died, since, if the ratification be retroactive, it is as if it were endorsed upon the deed when given, and inures to the benefit of the grantee of Horton, the original grantee, not as a new title acquired by a warrantor subsequent to his deed inures to the benefit of the grantee, but as a deed, imperfect when executed, may be made perfect as of the date when it was delivered. This was the ruling of the court in *Steeple v. Downing*, 60 Ind. 478.

"The object of the proviso was not to prevent the alienation of lands *in toto*, but to protect the Indian against the improvident disposition of his property, and it will be presumed that the president, before affixing his approval, satisfied himself that no fraud or imposition had been practiced upon the Indian when the deed was originally obtained."

The case was again before the court in *Lomax v. Pickering*, 173 U. S. 26, and the ground upon which the former decision was placed is stated in these words.

"The case was reversed by this court upon the ground that the approval subsequently given by the president to the conveyance was retroactive and was equivalent to permission before execution and delivery."

Pickering's title has already been stated. Lomax claimed title under a deed from Joseph Robinson to Alexander McCluer, dated November 22, 1870, and approved by the president February 24, 1871. It is thus seen that the deed from the Indian to Pickering's grantor was dated August 3, 1858, and approved January 21, 1871, and that the conveyance from the Indian, under which Lomax claimed, was dated November 22, 1870, and approved February 24, 1871. The stress of the case when last decided sheds no direct light on this controversy; but it is significant that the title resting on the earlier deed was upheld, although it was not recorded, with the approval of the president endorsed thereon, until after the subsequent deed, with a like approval endorsed thereon, was recorded. The unapproved deed being recorded, was held competent to convey notice to subsequent purchasers, which, of course, could not be true, if it was void.

It is true that this court, in *Libby v. Clark*, 118 U. S. 250, held that the title conveyed to an Indian allottee is a fee simple title, and that the restriction on the right of the allottee to convey does not deprive the title of the character of a fee simple estate; and it is largely by reason of the fact that Lykins owned such a title when he sold the land that we insist his conveyance was valid, although incomplete, at its date. In all other respects *Libby v. Clark* differs wholly from this case, because by the 7th article of the treaty of June 24, 1862, there under consideration, it was

stipulated that the land should not be alienated until, by the terms of the treaty, the allottees became citizens of the United States.

The authorities already cited make it unnecessary to combat the position of opposing counsel that the secretary, by consenting to the deed in question, undertook to sell the land. The averments of the petition refute their other position, that a deed, to be good, must be signed and delivered during the lifetime of the grantor. For some reason they alleged that the allottee did not ask the secretary to give his consent to the deed, and that it was presented to the secretary for approval after the death of the allottee. It is not disclosed, by substantive averment, what was done with the deed after it was executed, but it is fairly inferable, from what is said, that it was delivered to the grantee, and that he presented it to the department for approval.

The opposing brief is rich in assertion but poor in argument. There is no analogy between a deed made by an attorney in fact, after the death of his principal, and a deed fully executed and delivered during the life of the grantor, and imperfect only in the sense that it has not been consented to by an authority having supervisory power over his business and property. Counsel say (brief p. 9) that the approval of the deed, without the request of the heirs of the grantor, after the death of the grantor, was simply an attempt to make a void deed valid; and they add that such a power was not vested in the secretary, because he

could only consent that the Indian himself might make a deed. The fallacy of this argument is apparent. The grantor had made the deed. It was valid so far as he could make it valid. He had received value for it and the secretary is presumed to have so found. As said in *Ashley v. Eberts*, there had been a sale and a purchase subject to the approval of the secretary, and the act of that officer was simply the consummation of the contract. In the face of all this the plaintiffs, upon the most meritless quibble imaginable, claim that their ancestor never parted with his title, because he died before the secretary consented to his deed. According to this the deed would have been void if the grantor had died immediately after signing it and putting the consideration in his pocket and before the secretary could be advised of the sale. In that case, if not in this, the plaintiffs would have inherited the money and also the land. As suggested by Mr. Justice BROWN, it "would be sticking in the bark," with a vengeance, to hold that such a deed is void, for Lykins died about three months after he executed it.

Equally sophistical is the attempt to differentiate this case from *Pickering v. Lomax*. Counsel say that where the *grantee* in an Indian deed dies before it is approved, the title, when the deed is approved, enures to his heirs. In the next breath they say the deed is void until and unless approved; and the logic of this position inevitably is that the consent of the secretary must be obtained before the sale is made or the conveyance execut-

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ed. If the effect of the death of an Indian grantor is to annul a deed made by him, but not consented to till after his death, there is no possible escape from the conclusion that the death of the grantee would have the same effect. If the assent of the secretary is the thing which gives vitality to such a deed—if such a conveyance is nothing but waste paper until the secretary assents to it—then, when such assent is given, both grantor and grantee must be living. If either party dies the deed dies with him; and the title no more enures to the heirs of the grantee, than does the liability on the covenants of the grantor fall on his heirs.

But, say counsel (as though that was a material consideration), there is nothing to show that the grantor ever requested the secretary to approve his deed; that the most that can be assumed is that he attempted to make an unauthorized, and, therefore, ineffectual sale; and that after his death some one procured the approval of the deed, without the knowledge or consent of the plaintiffs.

The vice of this argument is best illustrated by the averments of the petition. Those averments are that the grantor did not, during his lifetime, sell or convey the land with the consent of the secretary; that he did sell and convey it without the prior consent of that officer, and that such consent was given after the grantor's death. The necessary implication from these averments is that Lykins sold the land for value, and executed and delivered a deed which required

only the assent of the secretary to make it perfect and effectual; and the allegation that the conveyance was presented to the secretary is equivalent to saying that the grantee presented it after its delivery to him by the grantor.

Here, then, was an imperfect deed, accompanied by an implied request for approval by the officer whose consent to it was necessary, coupled with the presumptions arising from the conveyance, that it was executed for value, and (from the possession thereof by the grantee), that it had been delivered The request—*i. e.* the deed of the grantor—was presented by the grantee, presumably with the necessary evidence of fairness and good faith to enable the secretary to give his consent to it. There was nothing lacking in the transaction at its date, nor on the day Lykins died, except the formality of the secretary's consent.

With such a case *Hunt v. Rousmanier*, 8 Wheat. 174, cited by opposing counsel, and in which it is held that the authority conferred by a naked power of attorney is revoked by the death of the party who conferred it, has nothing in common. Neither have the other cases on our adversaries brief, in which it was held that deeds made by Indians, and *never* approved, conveyed no title.

All that was necessary here was to obtain the *assent* of the secretary to the *act* of Lykins; when such assent was given is of no importance. When given it related back to the act, and whether the actor was then living or dead is equally imma-

terial. The demise of Lykins did not disable the secretary from the performance of his duty; he was as fully qualified after that occurrence as before to decide whether the transaction was such as he ought to assent to.

THE DEED IN CONTROVERSY IS SHOWN BY THE AVERMENTS OF THE PETITION TO HAVE BEEN DELIVERED.

It has already been shown that the averments of the petition fairly imply a delivery of the deed. It is manifest that the pleader relied wholly on the quirk that the secretary assented to the deed after Lykins died. It is not putting the case too strongly to say that a delivery of the deed must be inferred from the averment that it was executed and assented to by the secretary. The authorities already referred to sufficiently show that, under the circumstances of this case, there was a delivery.

It is manifest, from the opinion in *Pickering v. Lomax*, that the court considered the deed in that case delivered as of its date, and that the grantee was vested with the right to present it for approval. So, here, Lykins should be presumed to have delivered the deed when he received the consideration. The averment is that he did not request the consent of the secretary. Therefore, the grantee must have made the request, and must have deposited the instrument with the secretary. He could only have obtained possession of it from Lykins.

Bouvier's Law Dict. (Rawle's Revision) says that a deed is always delivered when parted with by the grantor with an intent that it shall become a muniment of title in the grantee.

Devlin on Deeds, Sec. 260, says that delivery is the act of the grantor indicated either by acts or words, or both, which shows the intention on his part to perfect the transaction by a surrender of the instrument to the grantee, or to some third person for his benefit; and it is well settled that the question of delivery is always one of intention. Of course, delivery of a deed is essential to its validity; yet, as in *Gould v. Day*, 94 U. S. 405, 412, a delivery will be presumed from the concurrent acts of the parties recognizing a transfer of title. After Lykins executed the deed in question and received the consideration, he certainly had no right to retain control of it.

And, as held in *Games v. Dunn*, 14 Pet. 322, possession of a deed by a party claiming under it is *prima facie* evidence of its delivery.

Why it was necessary to cite to this point such a case as *Kansas City v. O'Connor*, 82 Mo. App. 655, is not apparent. That was an action on a bond given for the faithful performance of a contract for street improvements, which also bound the contractor to sprinkle the street. It was decided that this part of the contract was *ultra vires*; and the conclusion was reached that the contract was an entirety; and, as part of it was void, all of it was.

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Equally inapplicable is *People v. Van Ness*, 70 Cal. 85, 21 Pac. Rep. 554. That was an action on the official bond of Van Ness. The bond was dated on January 11, 1876, and was superseded by another bond dated April 12, 1876. This latter bond was required to be approved by the governor and filed in the office of the secretary of state. It was held that the second bond did not supersede the first one until it was approved and filed; and the court incidentally remarked that there was no delivery of it until it was approved.

Another case cited in the opposing brief is *Powell v. Banks*, 146 Mo. 620. The question there was as to which of two trust deeds was the prior lien on certain land. Among other things the defendants contended that there was no delivery of the deed of trust under which the plaintiff claimed (p. 632). This contention was based on the fact that the deed was signed by Banks and left at a bank to be signed by his wife, and then delivered. The plaintiffs insisted that the deed was good as to Banks, notwithstanding his wife did not sign it. While the case is not in point the authorities referred to in the opinion show that the position already taken in this argument as to delivery is the correct one. For example, quoting from 2 Greenl. Ev. (15 Ed.) § 297, it is said that "the delivery of a deed is complete when the grantor has parted with his dominion over it, with the intent that it shall pass to the grantee, provided the latter assents." And the court concurs with the statement already made, that the

delivery of a deed is largely a question of intent, and that the presumption of delivery follows from the possession or the deed by the grantee.

THE CLAIM THAT THE PLAINTIFFS WERE NECESSARY PARTIES TO THE DEED EXECUTED BY DAVID LYKINS IS UNSOUND, AND IS NOT RAISED BY THE RECORD.

The second article of the treaty of May 30, 1854, ceded to the government all the land then occupied by the Indian tribes, excepting an amount equal to 160 acres for each member of the tribe, and ten additional sections reserved for other purposes. Article 3 provided that individuals and heads of families of the tribe should select the land reserved for them, and that patents therefor should be issued to the persons or heads of families entitled thereto. The schedule attached to the treaty shows that there were five persons in the family of David Lykins, and that he was entitled to a patent for 800 acres of land. Accordingly a patent, a copy of which is printed in the record, was issued to said Lykins, which conveyed to him the legal title to the land therein described. No estate in the land was conveyed to the members of his family. The treaty proceeded upon the idea that the head of the family was entitled to a conveyance of all the land he and his family were entitled to, and the patent followed the treaty.

THE SECOND AND THIRD POINTS IN THE BRIEF WERE NOT MADE IN THE COURT BELOW.

It is not averred in the petition that the deed was not delivered, nor that the plaintiffs were necessary parties to it. The distinct averment is that the land was conveyed to David Lykins, and that it descended to the plaintiffs, as his heirs at law, because of the informality in the deed already adverted to. The assignment of errors is consistent with the petition in this respect, and the first appearance of these points is in the brief.

Under section 4, paragraph III, of rule 21, and Sec. 997, R. S., these points can not be considered. And, even though they had been made in the assignment of errors, it is well settled that they could not be thus imported into the case. The record must show that every point this court is asked to decide was raised in the court below.

Ansbro v. United States, 159. U. S. 695.
Cornell v. Green, 163 U. S. 75.

It would be a waste of time and space to multiply citations of authority to this proposition.

THE KANSAS STATUTE OF LIMITATION BARS THE ACTION.

The second paragraph of the demurrer (Rec. p. 10) invoked this defence. The statute relied on provides that a civil action for the recovery of real property can only be commenced within fifteen years after the cause of action accrues. The

petition alleges that the title to the land descended to the plaintiffs on August 14, 1864. If the plaintiffs ever had the right to institute this action, it accrued to them on that date, and has continued to exist ever since. If they have the right to go into the courts to vindicate their rights, they ought to be governed by the general law applicable to all litigants. They aver no disability, unless it arises from their membership in the Indian tribe, or the allotment of the land to David Lykins. Neither of these facts prevented the institution of an action by the plaintiffs. The courts of Kansas were open to them during all this time; and there is as much reason why a statute of limitations should be enforced against these plaintiff as there was for invoking the doctrine of laches against the plaintiff in *Felix v. Patrick*, 145 U. S. 317, 332. If the plaintiffs had the right to bring an action they certainly will not be exempted from the consequences of not bringing it within the time limited by the statute.

The ruling in *McGannon v. Straightledge*, 32 Kansas 524, is not in point. That was ejectment by McGannon to recover a tract of land allotted to one Pa-kan-giah, a member of the Peoria tribe, to whom it had been allotted under the treaty of May 30, 1854. Pa-kan-giah conveyed the land to Baptiste Peoria, the same person to whom Lykins conveyed the land involved here. That deed was never approved. The allottee having died, his sole heir conveyed the land, to McGannon, and that conveyance was approved.

It was admitted that the deed from Pa-kan-giah was void, and that the land remained Indian land, and the title an Indian title, until it was conveyed by the heir of Pa-kan-giah to McGannon. In other words, it remained Indian land until June 23, 1882, the date of McGannon's conveyance On April 25, 1883, McGannon commenced his action. Unquestionably, within the repeated rulings of this court in such cases as *The Kansas Indians*, 72, U. S. 737, *Stevens v. Smith*, 77 U. S. 321, and *Gibson v. Chouteau*, 80 U. S. 92-99, no statute of limitations ran against Lykins or his heirs so long as congress retained control of the alienation of the land; and the only doubt as to this point arises under the act of congress (passed pursuant to the treaty) restraining the sale of the property without the consent of the secretary of the interior. But if the deed under which the defendant holds was valid, or by relation became valid, such control of congress terminated on that date, and the possession of Mrs. McGrath, which by the petition commenced in and has been continuous since 1865, put the statute of limitations in operation. In Kansas, adverse possession of land for fifteen years, even without color of title, bars an action of ejectment brought by the owner of the record title.

Anderson v. Burnham, 52 Kan. 454.

The limitation of actions in the federal courts "is governed by the *lex fori*, and is controlled by

the legislation of the state in which the action is brought, as construed by the highest court of that state."

Great Western Tel. Co. v. Purdy, 162 U. S. 329, 339.

For the reasons stated in the motion to dismiss, the writ of error should be dismissed; if not, the judgment should be affirmed.

Respectfully submitted.

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